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No. 08-683

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In The
# Supreme Court of the United States

F. DOUGLAS CANNON, MARGARET LOUISE CANNON, and ALLAN ROBERT CANNON,

*Petitioners,*

v.

ROBERT M. GATES, Secretary, United States Department of Defense; UNITED STATES DEPARTMENT OF DEFENSE; UNITED STATES DEPARTMENT OF THE ARMY; UNITED STATES OF AMERICA,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

The central issue in this case is whether the timing-of-review provision of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9613(h), bars a suit to compel a federal cleanup of private property that the federal government contaminated where the federal government simply points to intermittent "ongoing" investigations that have no objective goals or timelines, or whether the federal government must point to an objective referent that commits it and other responsible parties to an action or plan before it may invoke the provision. In this case, the Tenth Circuit held that so long as the federal government declares that it will conduct some investigation, even when it specifies no date certain, CERCLA bars judicial review. App. 14. The Seventh Circuit has held, however, that the federal government may not invoke CERCLA's timing-of-review provision based only upon vague assertions that future federal actions will occur. *Frey v. Envtl. Prot. Agency*, 403 F.3d 828, 834 (7th Cir. 2005) ("There is no support in the statute for such an open-ended prohibition on a citizen suit."). Instead, the Seventh Circuit required the federal government to provide an objective point of reference that commits it to a future action. *Id.* ("For EPA to delay Frey's suit, it must point to some objective referent that commits it and other responsible parties to an action or plan."). Without such a commitment, the Seventh Circuit held, the federal government

may not invoke CERCLA's timing-of-review provision. *Id.*

Here, Respondents continue to point to their history of on-again, off-again "studies" in an attempt to persuade this Court that a CERCLA cleanup is "ongoing" on the Cannons' property. Respondents' Brief in Opposition at 9-14. Conspicuously absent from Respondents' Brief in Opposition, however, is a timeline of this "ongoing" process.

Instead of providing a timeline showing actual deadlines, Respondents try to impress this Court by arguing that the federal government has taken preliminary steps. *Id.* at 7, 10. Specifically, Respondents note that the federal government has produced a draft Archive Search Report, which was compiled in 2001 as an addendum to a 1993 report that compiled historical records, interviews, and site surveys to determine the nature of military testing conducted on the Cannons' property. *Id.* Respondents also point to a draft Engineering Evaluation and Cost Analysis Report ("EE/CA"), which was completed in draft form in 1998 but never finalized; and a draft site inspection plan, produced in 2006 and purportedly finalized in 2007.[1] *Id.* Respondents further point to rights-of-entry secured from the Cannons. *Id.* at 10.

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[1] Respondents moved below for the Tenth Circuit to take judicial notice of the final site inspection plan. Although the Cannons did not oppose the motion, insofar as it related to the existence of the final site inspection plan, the Tenth Circuit

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When viewed in context, the purported "ongoing" investigations amount to little more than paper-pushing exercises intended to deprive federal courts of jurisdiction to review Respondents' disregard for CERCLA's mandate to expeditiously clean up hazardous waste sites, including the Cannons' property. 42 U.S.C. § 9604. The most recent series of "ongoing" investigations began only after the Cannons filed this case in November 2005; indeed, Respondents can point to no action actually occurring *on* the Cannons' property between 1996, when the draft EE/CA was produced, and the initiation of the instant lawsuit in 2005. These are hardly the actions that result in the type of progress toward cleaning up hazardous waste sites intended by CERCLA. *See Frey*, 403 F.3d at 834 ("[T]he time limits in § 113(h) are geared to concrete, existing, remedial measures; not measures that might be devised as some future date." (internal quotation omitted)).

Forward progress lies at the heart of CERCLA's timing-of-review provision, as acknowledged by the Seventh Circuit in *Frey*. 403 F.3d at 834 (CERCLA requires "active steps designed to clean up a site." (internal quotation omitted)). As Respondents note, the timing-of-review provision of CERCLA is intended

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denied the motion. App. 14, n.6. Like the draft site inspection plan, the final version commits no resources to cleaning up the Cannons' property and contains no timeline for completion. Instead, it merely provides guidelines for the methodology to be employed in surveying the Cannons' property.

to bar judicial review "that might interfere with the *expeditious* cleanup effort." Respondents' Brief in Opposition at 6 (emphasis added). In this case, however, it is the Respondents who themselves, not the Cannons' lawsuit, are responsible for the interminable delay in the cleanup of the Cannons' property.

Respondents assert that judicial review in this case would "risk substituting a federal court's judgment for the authorized judgment of the Corps [of Engineers] about what steps are necessary and appropriate with respect to [the Cannons'] property." *Id.* at 12 (internal citations and alterations omitted; remaining brackets added). This argument misstates the purpose of this lawsuit. The Cannons have not asked any federal court to usurp the Corps of Engineers' discretion as to what actions are required to clean up their property. All the Cannons seek is an order requiring the Corps of Engineers to commit to an objective timeline providing goals and objectives leading to the cleanup of the Cannons' property, if the Corps of Engineers determines that a cleanup is necessary. Petition for Writ of Certiorari at 26-27 ("[T]he Cannons' property cries out for a federal court to assert jurisdiction to oversee and establish deadlines in the CERCLA process . . . to ensure that the Corps of Engineers develops a comprehensive plan to evaluate the environmental conditions on and beneath the Cannons' property, completes the necessary studies and evaluations, and determines whether a response action is required and, if so, how and when the cleanup will be completed."); *see Frey*, 403 F.3d at

834-836 ("We recognize that Congress intended for remedial action to be complete before permitting judicial review. Congress did not, however, intend to extinguish judicial review altogether." (internal citations omitted)).

Respondents also assert that the form of relief that the Cannons seek would "relate to the goals of the cleanup." Respondents' Brief in Opposition at 12. In support of this argument, Respondents cite *New Mexico v. General Electric Co.*, 467 F.3d 1223 (10th Cir. 2006), wherein the State sought monetary damages from potentially responsible parties under tort theories. This argument, however, also misstates the Cannons' position. The only goal sought by the Cannons is the cleanup of their property. Petition for Writ of Certiorari at 26-28. Or, in other words, the Cannons' only goal is to have the federal government cease the endless "ongoing" investigations and actually do what Congress intended them to do: clean up the private property that the federal government contaminated. After more than 63 years, three generations of Cannon family ownership of the property, and two federal lawsuits, this is not asking too much.

Respondents' attempt to distinguish the Seventh Circuit's *Frey* holding from the case at bar is meritless. *See* Respondents' Brief in Opposition at 12-14. Respondents argue that this case differs from *Frey* because the Cannons have not contended that the "Corps [of Engineers] has completed a removal or remedial action with respect to their property." *Id.* at 13. Objectively, this Court should look to the actions

of the federal government, not to whether the Cannons have asserted that a cleanup has been "completed." Indeed, based upon the history of delay followed by intermittent "ongoing" study, any property owner could reasonably, objectively conclude that no cleanup was forthcoming at all. Regardless, the holding in *Frey* is directly on point. The Seventh Circuit expressly rejected an "open-ended prohibition on citizen suit" and, instead, required the federal government show "active steps designed to clean up a site . . . not measures that might be devised at some future date" before CERCLA's timing-of-review provision may be invoked. *Frey*, 403 F.3d at 834. Here, Respondents have failed in that showing.

Finally, Respondents contend that "the factbound question whether the government is proceeding with reasonable dispatch in this case would not warrant this Court's review." Respondents' Brief in Opposition at 14. This argument is spurious; there are no issues of fact to be resolved. A delay of more than 63 years, with no objective cleanup occurring on the Cannons' property, is the antithesis of the expeditious cleanup of a hazardous waste site as mandated by CERCLA. Indeed, the federal government's continued delay is unreasonable per se and cries for a federal court to exercise jurisdiction.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted by,

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